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Nos. 08-289 and 08-294

IN THE
Supreme Court of the United States

THOMAS C. HORNE, ARIZONA STATE SUPERINTENDENT OF PUBLIC INSTRUCTION,
Petitioner,

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,
Petitioners,

v.

MIRIAM FLORES ET AL.; STATE OF ARIZONA ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NATIONAL SENIOR CITIZENS LAW CENTER, NATIONAL HEALTH LAW PROGRAM, AND NEW YORK LAWYERS FOR THE PUBLIC INTEREST AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in concluding that no significant change in fact or law justified dissolving its orders requiring the State of Arizona to determine the costs of an appropriate program for English Language Learner (ELL) students and to provide funding that was not arbitrary in relation to those costs.

2. Whether the court of appeals applied the correct standard in reviewing the district court's denial of petitioners' Rule 60(b)(5) motion.

3. Whether a state testing and accountability plan that is approved by the Secretary of Education as a condition for funding under the No Child Left Behind statute automatically satisfies the requirement under the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. § 1703(f), to "take appropriate action" to overcome language barriers that impede participation in instructional programs.

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INTEREST OF AMICI CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit legal organization that assists African Americans and other people of color to secure their civil and constitutional rights. For more than six decades, LDF has worked to dismantle barriers in public education and ensure equal educational opportunity for all students. LDF has litigated numerous landmark education cases, including *Brown v. Board of Education*, 347 U.S. 483 (1954).

A significant portion of LDF's docket has consistently been comprised of cases involving injunctive relief to remedy civil rights violations, and the standards for modification and termination of court decrees are, therefore, of particular and continuing concern. Specifically, LDF has represented parties in several key cases before this Court involving relief pursuant to Federal Rule of Civil Procedure 60(b), including *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); and *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991).

The National Senior Citizens Law Center (NSCLC) is a non-profit organization that advocates

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[1] Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Respondents Flores *et al.*, have filed a blanket consent letter with the Clerk of the Court; letters of consent from all other parties are lodged with the Clerk of the Court pursuant to Rule 37.3.

nationwide to promote the independence and well-being of low-income older persons and people with disabilities. For more than 35 years, NSCLC has served these populations through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys and paralegals in legal aid programs. NSCLC believes that proper application of the Rule 60(b) standard is essential to maintaining the effectiveness of federal laws that protect its constituents' health, safety, and security.

The National Health Law Program (NHeLP) is one of the country's oldest public interest law firms and works on behalf of low-income people, children, people of color, and limited-English proficient persons to improve access to needed health care services. NHeLP provides legal and policy analysis, advocacy, information, and education. When they are unable to resolve disputes on behalf of clients, NHeLP attorneys engage in litigation to protect clients' rights, safety, and ability to be healthy. NHeLP attorneys' work depends on the ability to enforce settlements and court orders when they are violated.

New York Lawyers for the Public Interest (NYLPI) is a not-for-profit civil rights organization and a federally-funded Protection and Advocacy agency. NYLPI engages in advocacy and litigation on behalf of low income and disadvantaged individuals in New York City. A significant portion of NYLPI's work is on behalf of individuals with disabilities. In this context, NYLPI works to ensure that children with special educational needs are afforded a free and appropriate public education. NYLPI regularly engages in litigation seeking

injunctive relief for civil rights violations and currently monitors consent decrees in cases involving the provision of mental health services for inmates with mental illness, the deinstitutionalization of individuals with mental retardation, and access to public and private spaces for individuals with physical disabilities. NYLPI participated as an *amici* in *Board of Education of City School District of City of New York v. Tom F.*, 128 S.Ct. 1 (2007).

INTRODUCTION

Nine years ago, a federal district court found that Arizona had denied thousands of English Language Learner (ELL) students in the Nogales Unified School District (Nogales) and throughout the state the basic educational opportunities they need to succeed in life. Accordingly, the district court held that Arizona's ELL programs were in violation of the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. §§ 1701, *et seq*.

The district court's final judgment against the state was not appealed. Now, petitioners seek relief from that final judgment under Federal Rule of Civil Procedure 60(b)(5), claiming compliance with the judgment. Over the entire course of these nine years, however, the state has persistently failed to comply with the obligations of the final judgment. That noncompliance is a sufficient ground to deny petitioners Rule 60(b)(5) relief.

There is also a simpler and equally compelling reason for this Court to affirm: As the courts below determined and as recent guidance from the U.S.

Department of Education confirms, HB 2064—the state legislature's measure adopted in 2006 and asserted as the basis for state compliance with the district court's judgment—flatly contravenes federal law. *See* HB 2064, 47th Leg., 2d Reg. Sess. (Ariz. 2006). It was on this basis that the State of Arizona and the Arizona Board of Education, originally defendants in this case, refused to join the three state officials who are petitioners here in their request for Rule 60(b)(5) relief.

Because HB 2064 plainly violates federal law, this Court can affirm the decision below without entering the educational policy debates that petitioners and their *amici* discuss at length; without addressing the relationship between the EEOA and the No Child Left Behind Act (NCLB), 20 U.S.C. §§ 6301, *et seq*.; and without accepting petitioners' request for *de novo* review of the district court's detailed factual findings of persistent noncompliance with its 2000 judgment and subsequent remedial orders.

SUMMARY OF ARGUMENT

Petitioners invoke Rule 60(b)(5) which provides that "[o]n motion and just terms, the court may relieve a party . . . from a final judgment" for specified reasons. Of particular relevance to this case, relief may be granted if "the judgment has been satisfied" or if "applying [that judgment] prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5).

In the district court, the primary basis for petitioners' Rule 60(b)(5) motion was that HB 2064

satisfied the original 2000 judgment by fulfilling Arizona's obligation under the EEOA "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f); *see* J.A. 65. But the law is clear that a moving party is not entitled to Rule 60(b)(5) relief where, as here, the basis it advances for that relief violates federal law:

- First, HB 2064 contravenes federal statutory provisions designed to ensure that states and local school districts use federal NCLB funds to provide educational programs for ELL and other subgroups of students above and beyond what they otherwise would provide.
- Second, HB 2064 violates the EEOA by arbitrarily cutting off state funds for ELL classroom instruction after a student has received services for two years, irrespective of whether that student is sufficiently fluent in English to participate in a mainstream program or whether the school district has adequate funds of its own to continue such instruction.

See infra Part I.

In apparent recognition of these violations, petitioners shifted positions and now assert that the state had satisfied the district court's judgment prior to (and notwithstanding) the enactment of HB 2064, and is thus entitled to Rule 60(b)(5) relief. Again, the controlling law is clear. For a moving party to obtain relief based on its satisfaction of a prior judgment, a manifest prerequisite is good-faith, substantial, and sustainable compliance. Otherwise, principles of finality would be severely undermined.

Here, Arizona failed to demonstrate that it has ever—before or after passage of HB 2064—fully remedied the EEOA violations identified by the court's prior orders, much less that the state has the commitment and capacity to sustain any improvements in ELL programs that have been made since the 2000 judgment. *See infra* Part II.

Petitioners likewise do not warrant relief under the equitable prong of Rule 60(b)(5) because they have not demonstrated a significant change in law or fact. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). First, any changed factual circumstances have *reduced* the burden of satisfying the district court's prior orders and thus do not meet the *Rufo* standard. Second, this Court need not reach petitioners' contention that the 2002 enactment of NCLB qualifies as a significant change in law for purposes of Rule 60(b)(5). Given that HB 2064 violates key NCLB provisions, this is not an appropriate case to decide whether a state's compliance with NCLB satisfies its obligations under the EEOA. *See infra* Part III.

Finally, the district court's actions since 2000 have been consistent with principles of federalism. The district court reviewed the state's funding scheme under a deferential arbitrary-and-capricious standard, repeatedly extended deadlines, respected the state's policy judgments, and worked within the framework chosen by the state for administering and funding ELL programs. In light of the deference accorded by the district court, the state's continuing failures to comply, and its recent enactment of a legally flawed framework for ELL programs through HB 2064, there are no grounds for the Rule 60(b)(5)

relief that petitioners seek. Federal courts must be sensitive to federalism tenets, but are not limited to identifying legal violations and "hoping for compliance." *Frew v. Hawkins*, 540 U.S. 431, 440 (2004). *See infra* Part IV.

ARGUMENT

I. Because HB 2064 Violates Federal Law, It Forecloses Petitioners' Claim for Rule 60(b)(5) Relief.

In the district court, petitioners proffered the state legislature's 2006 enactment of HB 2064 as the primary ground for their Rule 60(b)(5) motion. J.A. 65. But HB 2064 cannot provide a basis for Rule 60(b)(5) relief because it violates federal law in several ways. As this Court held in *Rufo*, a Rule 60(b)(5) modification "must not create or perpetuate" a violation of federal law. 502 U.S. at 391; *see also Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576-79 & n.9 (1984) (noting that a district court cannot enter a disputed modification of a consent decree if the resulting order is inconsistent with federal law).

A. The System of State Support for ELL Programs Established by HB 2064 Violates Federal Education Law.

The laws governing the disbursement of federal NCLB funds require states and school districts to use those funds to enhance existing resources for targeted student populations, including ELL students. Such provisions ensure that limited federal funds are used as Congress intended: to

enhance educational opportunities by providing "'specific types of children in specific areas with special services above and beyond those normally provided as part of the district's regular educational program.'" *Bennett v. New Jersey*, 470 U.S. 632, 635 (1985) (quoting H.R. Rep. No. 95-1137, at 4, *as reprinted in* 1978 U.S.C.C.A.N. 4974); *accord Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 659 (1985). In direct contravention of these laws, HB 2064 demands that state funding for ELL students be reduced by the amount of federal funds that a particular school district receives.

1. Background on HB 2064.

HB 2064 modifies, but does not fundamentally change, the approach to state educational funding in place prior to and since 2000, when the district court concluded that the state was in violation of the EEOA. Arizona continues to allocate state funds to school districts using a weighted funding system to ensure that all students receive a basic education as required by the state constitution. Ariz. Const. art. XI, § 1(A); Pet.App. 122a-123a.[2]

This weighting system recognizes that some classes of students, such as ELL students, need extra programs or services to attain the basic educational competencies that the state constitution

[2] In a series of 1990s decisions, the Arizona Supreme Court interpreted the state constitution to guarantee state funding to ensure school districts meet basic standards. *See Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994) (en banc), *appeal after remand*, *Hull v. Albrecht*, 950 P.2d 1141 (Ariz. 1997), *appeal after remand*, 960 P.2d 634 (Ariz. 1998).

guarantees, and that there are additional costs specifically associated with those programs. *See* Pet.App. 13a; *see also Flores v. Arizona*, 48 F. Supp. 2d 937, 947, 956 (D. Ariz. 1999). To cover these additional costs, the state adds "Group B weights" to the base level of funding provided to local school districts. *See* A.R.S. § 15-943(2)(b). The system is structured so that the state serves as a necessary backstop when school district resources are insufficient to support the constitutionally required minimum program. *See* Pet.App. 126a.

HB 2064 slightly raised the Group B weight per ELL student, but made the increase contingent on the district court's determination that HB 2064 satisfied the 2000 judgment. A.R.S. § 15-756.01. HB 2064 also established two new separate funding sources for ELL programs: a structured English immersion (SEI) fund, A.R.S. § 15-756.04, and a compensatory instruction fund, A.R.S. § 15-756.11. Pursuant to HB 2064, a school district may apply to the state SEI fund for additional resources to cover the difference between the support generated by the Group B weights and the district's actual cost of funding ELL programs. A.R.S. § 15-756.01(I). The compensatory instruction fund offers school districts monies to provide tutoring, summer school, and other programs to improve English proficiency *outside* the "normal classroom" environment. A.R.S. § 15-756.11(G).

2. HB 2064 Violates 20 U.S.C. § 7902.

As the district court and court of appeals held, there is a direct and unavoidable conflict between HB 2064's ELL funding requirements and 20 U.S.C.

§ 7902. *See* Pet.App. 86a, 113a. 20 U.S.C. § 7902 is the product of revisions to the Elementary and Secondary Education Act of 1965 (ESEA), effectuated by the enactment of NCLB in 2002. *See* Pub. L. No. 107-110, § 9522, 115 Stat. 1980 (2002). It prohibits a state from taking into account federal education funding received by a school district pursuant to NCLB when "determining the eligibility of [the school district] for State aid, or the amount of State aid, with respect to free public education of children."[3] In other words, states must not penalize school districts that receive federal education dollars by adjusting those districts' share of otherwise available state education funding.

HB 2064 violates 20 U.S.C. § 7902 because it requires a school district to reduce its request for SEI funding by the amount of NCLB funds the school district receives, including: (i) "[a]ll federal [T]itle III monies and any other federal monies designated solely for the educational needs of English language learners," and (ii) a proportional amount of Title I and Title IIA funds determined by the number of students in the district's ELL programs. A.R.S. § 15-756.01(I). As the state respondents acknowledge, *see* State Respondents' Br. 11, HB 2064 thus "manifestly requires that federal funds be considered" in the distribution of state SEI funds to school districts. Pet.App. 86a (internal citations omitted); *see also* Pet.App. 113a.

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[3] Although it is not determinative here, 20 U.S.C. § 7902 includes an exemption for federal impact aid received by school districts pursuant to 20 U.S.C. § 7709.

In June 2008, four months after the court of appeals' decision, the U.S. Department of Education wrote to petitioner Tom Horne, the Arizona Superintendent of Public Instruction, to express the Department's concerns about the contradiction between HB 2064 and federal law. *See* Letter from Kerri L. Briggs, Assistant Sec'y of Elementary and Secondary Educ., U.S. Dep't of Educ., to Tom Horne, Superintendent of Pub. Instruction, Ariz. Dep't of Educ. (June 6, 2008) (hereinafter the "Horne letter"); State Respondents' Br. 19 & App. 1-4.[4] In the Horne letter, the Department warned Arizona that 20 U.S.C. § 7902 clearly prohibits any reduction in the amount of state SEI funds that a school district is eligible to receive, if the reduction is based on that district's receipt of federal NCLB funds. *Id.* App. 2.

Four months later, the U.S. Department of Education expanded on the Horne letter and issued guidance "to provide States with information on several funding issues . . . under Title III of the ESEA," which governs NCLB programmatic funding targeted at ELL students. *See* U.S. Dep't of Educ., *Supplement Not Supplant Provision of Title III of the ESEA* (Oct. 2, 2008) (hereinafter "Title III Guidance").[5] The Title III Guidance addressed the operation of 20 U.S.C. § 7902 in circumstances

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[4] A copy of the Horne letter is included in the appendix to the state respondents' brief.

[5] The Title III guidance and the Department's transmittal letter are available at: http://www.ed.gov/programs/sfgp/supplefinalattach2.pdf and http://www.ed.gov/programs/sfgp/supplefinalletter2.pdf.

identical to those created by the provisions of HB 2064 at issue here:

> The Department has encountered situations in which a State proposed to implement a law to reduce the amount of State aid available to local educational agencies (LEAs) for implementing language instruction educational programs for [ELL] students based on the amount of Title III funds its LEAs receive. Such statutes and policies violate Federal law. Section 9522 of the ESEA [20 U.S.C. § 7902] specifically prohibits a State from taking into consideration payments under any ESEA program (with the exception of Impact Aid) in determining the amount of State aid an LEA receives for the free public education of its children.

Title III Guidance 2-3.

The Horne letter and the Department's Title III Guidance have persuasive power and are thus "'entitled to respect.'" *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Accordingly, they confirm the conclusions of the courts below that the SEI funding requirements set forth by HB 2064 violate 20 U.S.C. § 7902.[6]

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[6] The district court and the U.S. Department of Education addressed HB 2064's violation of 20 U.S.C. § 7902 only with respect to SEI funding. As the court of appeals correctly observed, a violation of § 7902 is equally apparent with respect to HB 2064's compensatory instruction requirements, which effectively penalize school districts by providing them with less

3. HB 2064 Also Violates the "Supplement, Not Supplant" Provisions of Federal Law.

As the district court determined, HB 2064 also violates "supplement, not supplant" requirements contained in certain NCLB provisions, including Title I (which funds programs for disadvantaged students generally), Title IIA (which funds highly qualified teachers), and Title III (which funds ELL programs). *See, e.g.*, 20 U.S.C. § 6321(b) (Title I); 20 U.S.C. § 6623(b) (Title IIA); and 20 U.S.C. § 6825(g) (Title III). These requirements specifically forbid states and school districts from using these federal funds to replace state and local funding resources. *See* Pet.App. 114a; Title III Guidance 3; State Respondents' Br. App. 3.[7]

In the Horne letter, the U.S. Department of Education stressed that HB 2064's treatment of federal funds received by Arizona school districts pursuant to NCLB Titles I, IIA, and III violated anti-supplanting prohibitions because, "in the absence of these Federal funds, the district would have received and expended more State funds to serve ELL students." State Respondents' Br. App. 3. The Department's subsequent Title III Guidance reminded Arizona and all other states that "any reduction in the amount of State funds [a school

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compensatory instruction funding to the extent they receive federal dollars. A.R.S. § 15-756.11(E); Pet.App. 86a-87a.

[7] In light of its determination that HB 2064 clearly violated 20 U.S.C. § 7902, the court of appeals did not consider whether HB 2064 also violated these "supplement, not supplant" provisions. Pet.App. 88a-89a.

district] receives to implement language instruction educational programs based on the receipt of Federal funds for its [ELL] population under Title III violates the non-supplanting provision" of that Title. Title III Guidance 3.[8]

As this Court has noted, supplement-not-supplant obligations are not mere technicalities. *See Bennett*, 470 U.S. at 635. "Recognizing the fungibility of funds in state and local education budgets," these provisions effectively "limit the possibility that state and local educational agencies would use [federal] funding merely to maintain existing programs for educationally disadvantaged children while shifting [state and local] resources to regular educational programs." *New York v. U.S. Dep't of Educ.,* 903 F.2d 930, 934 (2d Cir. 1990); *see also Alexander v. Califano*, 432 F. Supp. 1182, 1189 (N.D. Cal. 1977) (Schwarzer, J.) ("[C]hildren eligible for Title I aid are not for that reason to receive less than they would otherwise be entitled to receive under *any* State or local program.") (emphasis in original).

HB 2064's clear violation of federal anti-supplanting requirements has serious consequences. As the district court found, "a district or school whose incremental costs [for ELL students] exceed the Group B weight provided to all schools will face

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[8] The Department's position should have come as no surprise to petitioners. Thomas Fagan—a 29-year Department veteran and Title I funding expert who testified for respondents during the district court's 2007 evidentiary hearing—stated that he had "'never seen such a blatant violation' of supplement not supplant restrictions." Pet.App. 106a.

the choice of violating federal laws governing the use of their federal funds, thereby jeopardizing both those funds and eligibility for future federal funds, or underfunding [their] ELL instructional programs," thus violating its EEOA obligations. Pet.App. 114a. By effectively compelling systemic underfunding of ELL instruction, HB 2064 also violates the EEOA. *Id.*; *see also* Title III Guidance 2 (concluding that use of NCLB Title III ELL funds "to provide core language instruction educational programs . . . would violate the supplement not supplant provision in section 3115(g) [20 U.S.C. § 6825(g)] of the Act as such services are required [under the EEOA and other laws] to be provided by States and districts regardless of the availability of Federal Title III funds").

Potential penalties for supplanting state dollars with federal dollars are significant; they include withholding or repayment of all federal educational funds Arizona receives. 20 U.S.C. §§ 1234a-1234d, 6311(g)(2); *see also Bennett*, 470 U.S. at 662-66. For this reason, the state respondents did not join petitioners' motion for Rule 60(b)(5) relief. *See* State Respondents' Br. 16.

B. HB 2064's Time Limit on ELL Instruction Violates Federal Law.

HB 2064's arbitrary two-year restriction on SEI and Group B weighted funding of ELL education also violates the EEOA. Pet.App. 114a-115a. After two years, school districts must choose between placing an ELL student in mainstream classes, even if they have not been reclassified as proficient in English, or diverting funds from other parts of their

educational programs for ELL instruction. While compensatory instruction funds remain available to school districts after two years, they may be used only for programs outside the "normal classroom" environment. A.R.S. § 15-756.11(G).

The EEOA places no such time limit on a state's obligation to ELL students. *See* 20 U.S.C. § 1703(f). Rather, the EEOA seeks to ensure "that schools [have] made a genuine and *good faith effort* . . . to remedy the language deficiencies of their students." *Castañeda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981) (emphasis added). At the district court's 2007 evidentiary hearing, "[w]hile all witnesses agreed that some students may swiftly become proficient in English, they also agreed that many will need ELL instruction for more than two years, and that some will still need help after three years of training." Pet.App. 34a. The district court made subsequent factual findings that the average time students spend in ELL programs well exceeded HB 2064's two-year cut-off, including in Nogales, where, "[o]n average, it takes ELL students . . . four to five years to be reclassified as English proficient." Pet.App. 108a.

By abandoning non-English proficient students to struggle in mainstream classes after only two years of ELL instruction, HB 2064 does not represent a good-faith (or even reasonable) attempt to comply with the EEOA's requirement that students receive "'language assistance [that will] enable them to participate in the instructional program of the district.'" Pet.App. 8a (quoting *Castañeda*, 648 F.2d at 1008).

C. Petitioners May Not Disavow the Relevance of HB 2064 to Their Rule 60(b)(5) Motion.

In apparent recognition of the deficiencies inherent in HB 2064, petitioners have shifted away from their prior reliance on HB 2064 as the primary basis for their Rule 60(b)(5) motion. Before this Court, they assert that they are entitled to Rule 60(b)(5) relief irrespective of HB 2064. *See* Superintendent's Br. 7, 33-51; Legislative Petitioners' Br. 31-32. Significantly, neither of the petitioners' merits briefs even mentions 20 U.S.C. § 7902 or NCLB's non-supplanting provisions.

Petitioners should be estopped from disavowal of their prior reliance upon HB 2064 as the primary basis for Rule 60(b)(5) relief. In *New Hampshire v. Maine*, 532 U.S. 742 (2001), this Court noted that the purpose of judicial estoppel "is to protect the integrity of the judicial process, by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* at 749-50 (internal quotation marks and citations omitted).

For the legislative petitioners, HB 2064 was the primary rationale for their involvement in this case. *See* Pet.App. 175a, 176a. In their motion to intervene filed just days after HB 2064 was enacted, they asserted that their involvement was necessary "to allow a full defense" of HB 2064. J.A. 57; *see also* J.A. 81 (state house of representatives resolution authorizing intervention specifically "to defend the new state plan for English language learners as enacted in H.B. 2064"); J.A. 84 (state senate

resolution providing a similarly focused rationale for intervention).

Petitioners now seek to disavow their early reliance on HB 2064 precisely to refashion their flawed theory to meet the "exigencies of the moment." *New Hampshire*, 532 U.S. at 750. Yet, without consideration of the statute that was the state's direct response to the district court's prior orders, and which governs operation of ELL programs in Arizona to this day, it would be impossible to rule on petitioners' Rule 60(b)(5) motion.

Even if petitioners are not estopped from disavowal of their reliance upon HB 2064 as the primary basis for Rule 60(b)(5) relief, petitioners cannot meet their Rule 60(b)(5) burden to demonstrate that they have otherwise complied with the district court's judgment. Indeed, legislative petitioners admitted below that they would have difficulty asserting grounds for Rule 60(b)(5) relief without HB 2064. *See* J.A. 59-60 ("If the Court finds the Act to be inadequate to satisfy the Court's orders, the Court may compel the Legislature to return to the task and to find money to pay for increased spending . . . .").[9]

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[9] Petitioners seek to have it both ways. *See, e.g.*, Superintendent's Br. 15 n.9 (noting that HB 2064 "further advanced ELL education"). The testimony at the evidentiary hearing regarding purported improvements in ELL programs in Nogales relied significantly on initiatives implemented as a result of HB 2064. *See, e.g.*, J.A. 181-85, 212.

II. Rule 60(b)(5) Relief Is Unwarranted Because Arizona Has Yet to Achieve, Much Less Sustain, Compliance with the District Court's Prior Orders.

Petitioners also argue that Rule 60(b)(5) relief is warranted because, even before enactment of HB 2064, the state had complied fully with the 2000 declaratory judgment and "cured" the EEOA violations. Superintendent's Br. 32.

Petitioners failed to demonstrate that the state satisfied the judgment for two reasons. First, based upon a thorough review of the record, the district court determined, and the court of appeals agreed, that petitioners had not demonstrated actual compliance with prior orders. Second, to the extent that Arizona has taken some steps towards remedying the EEOA violations identified by the district court, the adoption of HB 2064 and other recent actions raise serious doubts about the state's good-faith commitment and capacity to sustain any such progress.

A. As of the Date of Enactment of HB 2064, Arizona Could Not Demonstrate That It Had Established an Effective System to Provide Equal Educational Opportunity for English Language Learners.

The posture of this case is significant. This is not an appeal from the judgment of the district court. Instead, this is a prayer to be relieved from that unappealed final judgment. Petitioners do not dispute the district court's finding that, as of 2000, the state legislature's failure to raise base funding amounts to cope with inflation and to identify

properly the extra costs of programs for ELL students caused significant educational shortfalls for ELL students in Nogales and statewide, including programmatic deficiencies in teachers, tutors, and class size. *See* Superintendent's Br. 8-13; Legislative Petitioners' Br. 18. Indeed, there was no appeal of the district court's judgment that those educational deficiencies and the failure of the state to present a rational funding structure to support programs for ELL students violated the EEOA. Therefore, all state officials, including the three petitioners here, are bound to satisfy the district court's mandate. *See Nevada v. United States*, 463 U.S. 110, 129-30 (1983); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981).

Arizona has not met its burden of demonstrating that it is entitled to Rule 60(b)(5) relief because it has never satisfied the terms of the original unappealed judgment. "[I]n deciding whether to modify or dissolve a[n injunctive] decree, a[n enjoined party]'s compliance with previous court orders is obviously relevant." *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 249 (1991). "Among the factors which must inform the sound discretion of the court in ordering partial withdrawal [of judicial supervision] are the following: whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn . . . ." *Freeman v. Pitts*, 503 U.S. 467, 491 (1992); *accord Missouri v. Jenkins*, 515 U.S. 70, 89

(1995).[10] Petitioners, however, can point to no record of good-faith compliance with the court's orders.[11]

Following the original 2000 judgment, the state failed to create an effective system to ensure that ELL students receive equal educational opportunities in Arizona's public schools and that the state serves as the appropriate backstop when local funding is insufficient to cover the critical needs of ELL students. Most significantly, the state neither articulated a non-arbitrary rationale for its backstop funding of ELL programs nor specified the costs to school districts of providing the various elements of an adequate ELL program.

In framing the original 2000 order, the district court relied on the state's representation that the

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[10] The cited cases were school desegregation actions, but the principles announced and applied by this Court extend to injunctive relief cases in general. In *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*), this Court stated that "[i]n fashioning and effectuating the decrees [in those cases], the courts will be guided by equitable principles." *Id.* at 300. That point was reaffirmed in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), where the Court observed that "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Id.* at 15-16.

[11] This Court's decision in *Rufo* does not set a standard for determining whether Rule 60(b)(5) relief is warranted because a party has satisfied a prior judgment. *Rufo* addressed only the equitable prong of Rule 60(b)(5), as discussed further *infra* in Part III, and petitioners cite *Rufo* in only a cursory fashion in the portions of their briefs contending that the 2000 judgment has been satisfied. *See* Superintendent's Br. 34-35; Legislative Petitioners' Br. 31-44.

legislature had established a committee to conduct a cost study, noting that this study would provide "the first step the state needed to take towards setting a minimum base funding level for [ELL] programs that would not be arbitrary and capricious." J.A. 32-33. The committee did submit a report, but it failed to recommend the level of funding necessary to support effective ELL programs. J.A. 33.

In October 2000, ten months after issuance of the declaratory judgment, the district court observed that Arizona "ha[d] not even taken the first step" toward compliance, and ordered Arizona to "prepare a cost study to establish the proper appropriation to effectively implement" ELL programs "in a timely fashion." J.A. 34, 39, 42. In November 2000, a voter referendum, Proposition 203, required school districts to change to structured English immersion as their model for ELL instruction. J.A. 387; A.R.S. § 15-751, *et seq*. Proposition 203 did not alter the state's obligation under the original 2000 judgment. *See* Pet.App. 150a. Accordingly, "the State agreed that the cost study that was to be prepared pursuant to the Court's October 12, 2000 Order would reflect the funding and resources necessary to train and develop teachers of ELL students under the Proposition." J.A. 387.

The cost study released in 2001 "proved to be a disappointment" because it did not provide the data necessary for the state to begin remedying the EEOA violation. Pet.App. 16a. Moreover, the legislature did not appropriate funds based on this study. Pet.App. 17a; J.A. 42. In June 2001, the district court again ordered Arizona to establish a funding system that "shall bear a rational relationship to the

actual funding needed" for ELL students to master basic state-specified academic skills, and set a deadline of January 31, 2002 for compliance. J.A. 44. In December 2001, the legislature enacted HB 2010, which provided for a more comprehensive cost study and increased ELL funding in the interim. Pet.App. 156a-157a. In a June 2002 order, the district court deemed HB 2010's funding levels adequate "as an interim measure pending" the cost study funded by the statute. J.A. 54. The final draft of the cost study was not submitted until February 2005. Pet.App. 19a. While the cost study included expert estimates of ELL funding levels appropriate to support EEOA-compliant programs, the State once again failed to implement its findings. *Id.*

In a January 2005 order, the district court gave the state until the later of the close of the 2005 legislative session or April 30, 2005 to "appropriately and constitutionally fund[ ] the state's ELL programs taking into account the Court's previous orders." J.A. 393. Arizona did not meet either deadline. In December 2005, the district court held the state in contempt, Pet.App. 155a, but gave it yet another chance. The district court set a new deadline 15 days after the beginning of the 2006 legislative session. Pet.App. 173a. In response, the state legislature enacted HB 2064, which became law on March 9, 2006. Pet.App. 268a.

In sum, while overall state education funding levels may have increased from 2000 through the enactment of HB 2064, the state failed to establish a rational system to determine and then meet the ELL funding needs of school districts.

B. Relief Under Rule 60(b)(5) Was Also Inappropriate Because Arizona Could Not Show a Likelihood That It Would Sustain Compliance.

Even if Arizona's actions between the 2000 judgment and the spring of 2006 positively impacted educational opportunity for ELL students, Rule 60(b)(5) relief was correctly denied because petitioners failed to show that the state would continue to meet the needs of ELL students if the injunction were withdrawn.

Such a threshold demonstration of sustainability is required. *See United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952) ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when . . . there is probability of resumption."). In assessing sustainability, examination of a moving party's record of good-faith compliance with previous court orders is again instructive, for it "reduces the possibility that [the party]'s compliance with court orders is but a temporary . . . ritual." *Freeman,* 503 U.S. at 498-99 (quoting *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987)). This Court announced in *Freeman* that where such a record of compliance is absent, "we have without hesitation approved comprehensive and continued district court supervision." *Id.* at 499 (citing *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 461 (1979)).

Here, the district court noted that for the seven years "[p]rior to the end of the 2007 Legislative Session no action was taken to comply with the Original [2000] Order." J.A. 87. While the state

finally took some action in 2006 by passing HB 2064, it still failed to meet the district court's repeated and straightforward request for a system of support for ELL programs that was rationally related to the program models the state itself recommended. This failure led the district court to conclude that Arizona was still in "willful violation" of its prior orders without a proper defense for its "inability to comply." J.A. 89.

To demonstrate sustainability, Arizona must also show that it is unlikely that it will again violate federal law. *See Freeman*, 503 U.S. at 498 (noting that a "history of good-faith compliance . . . enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future"); *Dowell*, 498 U.S. at 247 (holding that the "purposes of the desegregation litigation had been fully achieved" when the school district was being operated in compliance with the law *and* "it was unlikely that the Board would return to its former ways"). Here, the deficiencies of HB 2064 stand as irrefutable evidence of Arizona's failure to establish a sustainable structure that meets the requirements of the EEOA. Pet.App. 179a. Indeed, HB 2064 makes things worse, by requiring Arizona and local school districts to violate multiple federal laws. *See supra* Part I.

Because of these defects, any progress that Arizona school districts have made is likely to be "fleeting at best." Pet.App. 100a. After the eight-day evidentiary hearing on petitioners' Rule 60(b)(5) motion, the record was clear that Nogales, the district from which this lawsuit originally arose, has

not received adequate funding from the State, forcing it to draw monies away from other programs and students to support instruction for ELL students and to pass repeated local tax overrides to maintain adequate funding levels. Neither of these approaches is sustainable.

Nogales Superintendent Guillermo V. Zamudio testified that, even with the district's commendable streamlining of school programming and creation of greater economies of scale, resource constraints undermine the district's ability to provide an appropriate education to its ELL students. *See* Pet.App. 36a-37a. Even petitioners acknowledge that Nogales and other school districts in Arizona are likely to face additional financial difficulties and budgetary shortfalls given the worsening economic crisis and the impact of the dramatic increase in foreclosures and changing property values on local tax revenues. *See* Legislative Petitioners' Br. 2. In this climate, a rational and equitable state funding structure that serves as an appropriate backstop when local funds may be inconsistent or lacking is critically important.

In the wake of HB 2064, Arizona cannot demonstrate that violations of federal laws will not continue to recur. *Cf. United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (holding that an injunction requires a "necessary determination . . . that there exists some cognizable danger of recurrent violation"), and Rule 60(b)(5) relief was thus properly denied.

III. Petitioners Otherwise Fail to Identify a Significant Change in Law or Fact Warranting Rule 60(b)(5) Relief.

To grant relief under the equitable prong of Rule 60(b)(5), a court must determine that a legally significant change in factual conditions or in law has occurred. *Agostini v. Felton*, 521 U.S. 203, 215 (1997); *Rufo*, 502 U.S. at 384. Apart from HB 2064, which does not justify relief for the reasons set forth above, petitioners have not met their burden of identifying a sufficient legal or factual basis for Rule 60(b)(5) relief.

In *Rufo*, this Court identified three types of changes in fact that might warrant modification: (1) "when changed factual conditions make compliance with [a consent decree or an injunction] substantially more onerous"; (2) when a decree or injunction "proves to be unworkable because of unforeseen obstacles"; or (3) "when enforcement of the decree without modification would be detrimental to the public interest." *Rufo*, 502 U.S. at 384. Modification is not permitted simply because "it is no longer convenient to live with the [prior court orders'] terms." *Rufo*, 502 U.S. at 383.

Here, petitioners do not allege that changed circumstances have made compliance more "onerous" or "unworkable"; rather, the alleged improvements in ELL programs and funding have made compliance easier. Indeed, petitioners identify no obstacles nor barriers to compliance; and, provided they correct the violations of federal law described *supra* in Part I, the state could readily take the steps necessary to support adequately its chosen ELL programs—as the

district court noted in its October 10, 2007 order following denial of Rule 60(b)(5) relief. J.A. 89-90. The district court's view that compliance was so close at that time suggests that Rule 60(b)(5) relief was (and remains) entirely unnecessary.

Petitioners fail to demonstrate—indeed, they do not seriously argue—that enforcement of the district court's prior orders would be "detrimental to the public interest." *Rufo*, 502 U.S. at 384. Certainly they suggest nothing comparable to the circumstances in which this Court determined such a modification would be appropriate in *Rufo*—*i.e.*, a modification to avoid pretrial release of accused violent felons. *Id*. at 384-85. To the contrary, the public interest strongly supports the continuation of this litigation until the state achieves compliance with the EEOA.

Petitioners also contend that enactment of NCLB was a significant change in law providing grounds for Rule 60(b)(5) relief. *See* Superintendent's Br. 51-61; Legislative Petitioners' Br. 50-57. For the reasons explained *supra*, petitioners' claim that a state's compliance with NCLB satisfies its obligations under EEOA is curtailed by HB 2064's express violation of NCLB's requirements regulating use of federal funds. In any event, NCLB does not render impermissible those obligations placed on the state by the EEOA, nor does it make legal the state's continued failure to provide a structure for supporting local school district ELL programs.[12] *See*

[12] For the reasons given by respondents, the NCLB statute supplements, rather than replaces, the requirements of the EEOA. *See* State Respondents' Br. 24-28; Flores Respondents Br. 48-60.

Rufo, 502 U.S. at 388. It is instructive that the Horne letter and the Title III Guidance affirm that states accepting NCLB funds remain subject to EEOA obligations and must also satisfy NCLB's requirements.[13] NCLB does not, therefore, constitute a significant change in law warranting modification, as contemplated under *Rufo*. *See id.* at 388-90.

IV. The District Court's Denial of Rule 60(b)(5) Relief Was Consistent with Principles of Federalism.

Notwithstanding the assertions of petitioners and their *amici* to the contrary, the district court consistently proceeded in a manner that respected federalism concerns and took the most deferential approach in seeking state compliance with federal law. *Cf.* Superintendent's Br. 32, 39-42; Legislative Petitioners' Br. 34-36; *Amici* American Legislative Exchange Council, *et al.* Br. 11-14.

Throughout this litigation, the district court reviewed the state's ELL program structure—including its provisions to assure that local districts have the resources necessary to implement Arizona's preferred instructional models—under an arbitrary-and-capricious standard. *See* J.A. 32, 44, 46, 49, 87. This highly deferential standard of review gave the utmost respect to the decision-making autonomy of state officials. *See Frew*, 540 U.S. at 442.

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[13] Moreover, following enactment of NCLB, the federal government has continued to pursue aggressively EEOA enforcement actions. *See* U.S. Dep't of Justice, Educational Opportunities Section, Cases on English Language Learners, *available at* http://www.usdoj.gov/crt/edo/caselist.php.

Petitioners and their *amici* incorrectly malign the decisions of the district court for "mandating dramatic increases in ELL-specific funding," requiring a "specific amount of earmarked funding," and "ignor[ing] the importance of preserving legislative appropriations authority." *See* Legislative Petitioners' Br. 50; Superintendent's Br. 43; *Amici* American Legislative Exchange Council, *et al*. Br. 16. To the contrary, the district court's orders never commanded the state to provide a specific level of incremental or earmarked funding for ELL students, but required only that the state establish a funding level rationally related to the actual costs of EEOA compliance, taking into account resources available to local school systems from other, legally available, sources. *See* J.A. 44, 87, 88. The district court repeatedly pursued the least restrictive remedy possible: merely setting deadlines and asking the state to achieve compliance by means of its own choosing.

The district court's orders were also sufficiently "flexible" to accommodate significant educational policy changes, including the shift to structured English immersion in Proposition 203. *Rufo*, 502 U.S. at 380. The district court recognized that questions of educational policy are within the competence of the political branches, and its role was only to address violations of federal law. *Flores*, 48 F. Supp. 2d at 949 ("Confronted, reluctantly, with this type of task in this case, this Court will fulfill the responsibility Congress has assigned to it without unduly substituting its educational values and theories for the educational and political decisions reserved to state or local school authorities

or the expert knowledge of educators."). Indeed, even legislative petitioners have acknowledged that the district court "left it up to the Legislature to craft a program that is not arbitrary and capricious." J.A. 72. Furthermore, to the extent that state actors have not presented a united front on the issue, the district court gave them considerable space to negotiate a means of compliance among themselves.

Federal courts are not limited to merely identifying violations of law and "hoping for compliance." *Frew*, 540 U.S. at 440; *see also Peacock v. Thomas*, 516 U.S. 349, 356 (1996) ("Without jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it is conferred by the Constitution.'" (quoting *Riggs v. Johnson County*, 73 U.S. 166, 187 (1867))). Consistent with this Court's decision in *Frew*, the district court here moved carefully with deference to the state authorities in terms of the relief it granted. 540 U.S. at 439-40. For example, it explicitly rejected certain post-judgment relief requested by the *Flores* plaintiffs because it "encroache[d] on a domain that primarily belongs to local government institutions, including the State's legislature." J.A. 38. Furthermore, the remedial action that the district court has consistently sought since 2000 is directly aimed at eliminating the state's current and ongoing violation of the EEOA, not at implementing the court's own view of what is an appropriate ELL pedagogy. *See Dowell*, 498 U.S. at 247.

Although the changes in programmatic models, alternative funding sources, and student

performance that petitioners emphasize may be relevant factors in the state's calculation of the appropriate funding level, these changes do not alter the basic fact that the state has yet to demonstrate that it has established a system for meeting its obligations under the EEOA in an effective, non-arbitrary and rational way. Accordingly, denial of Rule 60(b)(5) relief was proper.

CONCLUSION

For the foregoing reasons, as well as those outlined by respondents, the decision below should be affirmed.

Respectfully submitted,

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